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Issue date: 04Nov2002

Case Nos.: 2001-LHC-2222; 2002-LHC-1994; 2002-LHC-1995

OWCP Nos.: 18-66691; 18-74808; 18-75911

In the Matter of:

FREDERICK SIBERT,
Claimant

v.

NATIONAL STEEL & SHIPBUILDING COMPANY,
Employer

APPEARANCES:

JEFFREY M. WINTER, ESQ.,
On Behalf of the Claimant

ANDRIS E. INVEISS, ESQ.,
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS [1]

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act"). The claim is brought by Fred Sibert, Claimant, against National Steel & Shipbuilding Co. ("NASSCO"), Respondent. Claimant previously sustained a back injury during his employment that he now asserts requires further medical

[1] The following abbreviations will be used in citations to the record: JX- Joint Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

treatment.[2] In addition, Claimant has lateral epicondylitis in his left elbow, a condition he asserts is a result of his employment with NASSCO or as a compensable consequence thereof. Before a hearing was conducted by this Court, a California Worker's Compensation Appeals Board had determined that Mr. Sibert's current left elbow injury was not caused by an older work-related injury to his right elbow. A hearing was held on March 12, 2002 in San Diego, California, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Claimant's Exhibits Nos. 1-24; and

2) Respondent's Exhibits Nos. A-N, with G withdrawn.

Upon conclusion of the hearing, the record remained open for the submission by Respondent of a post-hearing MRI report and other medical evidence, which was received into evidence without objection and marked as Respondent's Exhibits K, L, M, and N.[3] This decision is being rendered after giving full consideration to the entire record.

STIPULATIONS [4]

[2] The issue concerning Claimant's back has since been resolved by the parties, based on a post-hearing MRI that was conducted. The record remained opened for submission of the MRI report, which was received into evidence as Respondent's Exhibit N.

The medical treatment sought by the claimant was removal of a metal structure placed in his back during an earlier back surgery. The structure consisted of six screws connected with rods and a crosslink. TR. 41; CX-8, pp. 85-89; RX-C. Dr. Sidney Levine, Claimant's treating physician, recommended that Claimant have the opportunity to have the metal removed, stating that such a procedure was not unreasonable, that the potential benefits of the surgery outweighed the risks, that the removal may alleviate some pain in Claimant's back, and that the removal would improve the quality of MRIs conducted near the area of the retained metal. TR. 41-44; CX-8, pp. 119-121; RX-C.

Dr. Levine's contentions were disputed by Respondent at the hearing. However, Respondent subsequently authorized the removal surgery based on the post-hearing MRI report by Dr. Larry Dodge, which stated that sufficient abnormalities existed in the MRI to warrant removal of the metal. RX-N.

[3] Exhibit K is a medical report by Radiology Medical Group, dated June 12, 1998. Exhibit L is a medical report by Dr. Janet Dunlap, dated August 27, 1998. Exhibit M consists of the medical reports of Dr. Larry Dodge, dated June 5, 1998, June 20, 2001, and January 29, 2002. Exhibit N consists of Dr. Dodge's medical report concerning the MRI that was conducted post-hearing and Respondent's correspondence evidencing its concession as to the removal surgery.

[4] TR. 6-7, unless otherwise indicated.

The Court finds sufficient evidence to support the following stipulations:

1) Claimant's injuries are governed by the Longshore and Harbor Workers' Compensation Act;

2) The disputed claims involve injuries to Claimant's back[5] and left arm.

3) Claimant was a Senior Material Expediter for NASSCO;

4) An employer/employee relationship existed at the time of all claims involved;

5) Claimant injured his back on June 9, 1995 (OWCP No. 18-60067) and June 4, 1996 (OWCP No. 18-63374);

6) Claimant is unable to return to his usual and customary work as a Senior Material Expediter;

7) With respect to Claimant's back injury, the issue of medical treatment is in dispute.[6]

8) With respect to Claimant's upper left extremity injury, the issues of causation and medical treatment are in dispute.

9) Claimant's average weekly wage is $808.00 per week.[7]

ISSUES

The unresolved issues in these proceedings are:

(1) Causation as to Claimant's left elbow injury;

(2) Reasonable and Necessary Medical Expenses as to Claimant's left elbow injury;

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[5] See Footnote 2.

[6] See Footnote 2.

[7] On October 7, 2002, the parties submitted to the Court a stipulation that Claimant's average weekly wage is $808.00. This stipulation has been marked as Joint Exhibit 1.

and

(3) Attorney's Fees.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Fred Sibert

Fred Sibert, Claimant, testified that he is fifty-four years old and was employed by NASSCO for 31 years. His last position with NASSCO was Senior Material Support Technician, which he began in 1979. His left elbow pain was first felt in January 2000. TR. 18-20.

In January 1997, Mr. Sibert had surgery on his right elbow, performed by Dr. Robert Averill. Mr. Sibert had a second surgery on his right elbow in October 1997, performed by Dr. Sidney Levine. Mr. Sibert had experienced pain in his right elbow from any gripping, pulling, or picking up, which he understood to be caused by manual labor at NASSCO. Six weeks after the first surgery to his right elbow, Mr. Sibert returned to his job at NASSCO, subject to restrictions such as no repetitive pulling, lifting, stretching, and turning of the right arm. Mr. Sibert worked in such a manner, basically using his left arm for any lifting and pulling, until his second right elbow surgery. After his second right elbow surgery, Mr. Sibert missed another six weeks and thereafter returned to work with the same restrictions. TR. 19-22.

Mr. Sibert underwent back surgery in October 1998. After the back surgery, he used a walker for about three months and afterward a cane for about three to four weeks. Mr. Sibert also used a foot brace for a drop foot condition. Since his back surgery, the only time Mr. Sibert worked at NASSCO was 3 ½ days in September or October of 1999. TR. 22-23, 30.

As a result of his back surgery and drop foot condition, Mr. Sibert's left foot does not pick up as high as his right foot, causing a tendency for him to trip. Mr. Sibert has tripped and fallen to the ground several times due to his drop foot condition, the first time being in about November 1998. In December 1999 or January 2000, Mr. Sibert fell hard while walking from his kitchen to his garage. This fall in late 1999 or early 2000 caused pain in Mr. Sibert's arms. TR. 23-24.

Mr. Sibert was advised to do home exercises as part of his recovery from back surgery. He did stretches by holding on to a countertop and squatting, as well as pushing himself off the counter. He also walked regularly. Although Mr. Sibert felt pain while doing the exercises, the pain was not sufficient to make him believe there was a problem. TR. 25.

From September 1999 to April 2000, Mr. Sibert's home activities were limited generally to walking twice a day and doing stretches, for which he gripped the countertop as part of his home

exercises. He did not participate in any other home activities, such as home or car repairs, because he did not want to injure himself further with respect to his back condition. Other than reaching to get a cup or paper plate, Mr. Sibert did not do home activities that involved reaching or grasping items above shoulder level. Housework and yard work had to be done by someone else. TR. 28-29.

Mr. Sibert began feeling pain in his left elbow no earlier than January 2000. He felt pain in his left elbow from pulling, gripping, turning, holding, or grasping with the left arm. These symptoms were essentially the same symptoms Mr. Sibert had experienced in the earlier problem with his right elbow. Toward the end of February 2000, he sought to make an appointment concerning his left elbow because the elbow was increasingly in pain. Mr. Sibert first reported the problem to Worker's Compensation at NASSCO. A week or two afterward, in April 2000, he had an appointment with Dr. Averill. Dr. Averill told him he had the same problem in his left elbow as he previously had in his right elbow. TR. 20, 25-26.

II. MEDICAL EVIDENCE

1. Testimony and Reports

Sidney H. Levine, M.D. [8]

Dr. Levine has been an orthopedic surgeon in the San Diego area for the past 32 years. He has been board certified since 1972. He currently performs back surgeries and surgeries on upper and lower extremities. Dr. Levine's most recent back surgery was on the morning of the hearing, and his most recent surgery on an extremity for lateral epicondylitis was about a month or two before the hearing. TR. 32-33, 45.

Dr. Levine has been treating Mr. Sibert for five years beginning in July 1997, including the performance of elbow surgery on Mr. Sibert in October 1997 and surgery on his back in October 1998. On July 8, 1997, Dr. Levine diagnosed Mr. Sibert with lateral epicondylitis in his right elbow caused by repetitive heavy lifting in the course of his employment with NASSCO. On October 28, 1997, Dr. Levine noted Mr. Sibert felt pain in his back, and Dr. Levine attributed that pain to Mr. Sibert's employment activities with NASSCO. Dr. Levine's subsequent medical reports repeatedly attribute Mr. Sibert's back injury to a June 4, 1996 work-related incident in which Mr. Sibert slipped on a wet deck and twisted his back. TR. 33, 47. CX-8, pp. 20-27, 34-41, 45, 47, 50, 54, 57, 61, 65, 69, 76, 81, 85, 90, 94, 98, 102, 106, 119; RX-C.

The first mention by Dr. Levine of Mr. Sibert's left upper extremity pain was in a July 5, 2000 report, on which date Dr. Levine diagnosed Mr. Sibert as having lateral epicondylitis in his left elbow. Since Dr. Levine's first treatment of Mr. Sibert until July of 2000, Dr. Levine had seen Mr. Sibert

[8] The records of Dr. Levine are reproduced as CX-8, CX-24 and RX-C. These records will be cited to the extent they differ from or add to Dr. Levine's testimony.

between 30 and 35 times. TR. 47-49; CX-8, pp. 114-118; RX-C.

Lateral epicondylitis is commonly known as tennis elbow. Tennis elbow does not generally require surgery, except when there is a lack of response from conservative treatment. Conservative treatment has been provided to Mr. Sibert's left elbow, including anti-inflammatory medicine and an elbow support. Sometimes physical treatment in the form of ultrasounds can be somewhat beneficial. No treatment was ever authorized for Mr. Sibert's left elbow. TR. 39-41.

Dr. Levine testified that he believes the current need for surgery in Mr. Sibert's left upper extremity is related to his employment. This opinion is consistent with Dr. Levine's reports on July 5, 2000, May 21, 2001, and February 28, 2002, which addressed the cause of Mr. Sibert's left elbow pain. Dr. Levine bases his opinion on these facts: (1) Mr. Sibert did strenuous labor for 31 years; (2) Mr. Sibert now has symptoms in his left elbow identical to symptoms in his right elbow, a condition that has been determined to be work-related; and (3) there has been no exposure, that Dr. Levine can elicit, outside of Mr. Sibert's employment that could have caused the symptoms. TR. 34-35; CX-8, pp. 114-118, 122-123; CX-24; RX-C.

Dr. Levine acknowledged that it took some time before Mr. Sibert became aware of the pain in his left elbow. However, despite the time discrepancy in noticing the pain, Dr. Levine believes the left elbow pain resulted from Mr. Sibert's employment and use of the walker, which required the application of considerable force to Mr. Sibert's upper extremities. Dr. Levine believes that relating an injury to employment is more easily made when there is a temporal proximity or a specific injury. However, without any nonindustrial causes, and in light of the back injury and tremendous amount of stress applied over the years, the back injury would have been more of a concern to Mr. Sibert than the left arm. When someone has an injury, especially a back, all the emphasis is placed on that area, and other areas are ignored, thereby possibly causing a failure in detection. TR. 35-36.

Dr. Levine does not agree with the finding by the California Worker's Compensation Appeals Board that Mr. Sibert's left elbow injury was not the result of overcompensating for his right elbow injury. Dr. Levine testified that other stress factors contributing to Mr. Sibert's need for surgery, besides the right elbow injury, are use of the walker, falling, and the home exercises. TR. 37-38.

Mr. Sibert had reported to Dr. Levine on several occasions that Mr. Sibert fell. Dr. Levine's handwritten notes on December 15, 1998 indicate Mr. Sibert had fallen on December 13, 1998, causing pain to his left leg, left hip, and left shoulder–but not his left elbow. An October 19, 1999 report indicates Mr. Sibert's left leg buckled, but does not mention left elbow pain. Dr. Levine does not recall any falling incident that resulted in left elbow pain. Dr. Levine opined that if Mr. Sibert fell in December 1999 and felt pain in January 2000, then that fall could have caused the further aggravation of the underlying condition. TR. 37-38, 52-54; CX-8, pp. 108-109; RX-C.

Mr. Sibert's home exercises are a contributing stress factor to his left elbow pain because lateral epicondylitis is an inflammation of the tendonous origin of the muscles about the elbow that bring up the wrist, and the muscles are aggravated by activities such as gripping and putting force on

the elbow. Grabbing the countertop would apply tension across the forearm muscles and onto the elbow. The same would be true for a push-up; extending the elbow against resistance puts stress on the outer aspect of the elbow. TR. 38-39.

Generally with lateral epicondylitis, there is some loss in grip strength, depending on how symptomatic the condition was at the time. A July 5, 2000 report indicates Mr. Sibert's grip strength was 40, 45, and 45 in the right hand and 55, 55, and 50 in the left hand. Based on an April 17, 1998 report, Mr. Sibert's grip strength was 45, 40, and 35 in the right hand and 50, 50, and 50 in the left. Based on these numbers, the left hand grip strength was slightly greater in July 2000 than in April 1998. According to a July 8, 1997 report, Mr. Sibert's grip strength was 50, 45, and 45 for the right hand and 65, 65, and 65 for the left hand. Dr. Levine testified that the July 5, 2000 numbers are similar or a little less than the July 8, 1997 numbers. TR. 54-56; CX-8, pp. 20-27, 61-64, 114-118; RX-C.

Dr. Levine did not have a statistic of how many NASSCO employees he has treated in the past ten years, but did not believe the number exceeded 1,000. Dr. Levine also did not know how many NASSCO employees he has treated in the last year nor how many he currently treats. Many injured NASSCO workers have made requests with NASSCO to see him. NASSCO would allow it, calling Dr. Levine and thereby technically referring injured workers to Dr. Levine. A good portion of injured workers from NASSCO are referred by their attorneys. TR. 45-47.

Dr. Levine has been used as an Agreed Medical Examiner, an examiner agreed to by both parties in a dispute. Dr. Levine is utilized as an Agreed Medical Examiner on a weekly basis. He believes he might be the most utilized Agreed Medical Examiner in the San Diego area, but has not been used as such by NASSCO in the past five years. Dr. Levine performs defense medical exams also, with a greater proportion of his cases on behalf of the defense. TR. 56-58.

Dr. Levine was involved in a discrepancy with NASSCO concerning fees owed by them. Dr. Levine was not sure about the amount of the dispute, but believed it to be significantly less than $500,000.00. He testified that the dispute was resolved in a settlement for perhaps $100,000.00. TR. 58-59.

2. Reports

Robert M. Averill, M.D.

Dr. Averill first examined Mr. Sibert on August 23, 1996 for pain in Mr. Sibert's right elbow. Mr. Sibert reported having pain over the outer side of his right elbow with squeezing and gripping activities. On that date, Mr. Sibert was diagnosed with lateral epicondylitis in his right elbow. Dr. Averill examined Mr. Sibert's right elbow further on October, 14, 1996, December 10, 1996, August 11, 1997, and August 3, 1998. On August 11, 1997, Dr. Averill reported that Mr. Sibert's right elbow injury arose out of his employment and during the course of his employment and therefore should be treated as an industrial injury. RX-A, pp. 16-37; CX-12.

Dr. Averill addressed Mr. Sibert's left elbow injury for the first time on April 24, 2000. Dr. Averill diagnosed Mr. Sibert with having lateral epicondylitis in his left elbow, but did not believe the left elbow injury arose out of his employment with NASSCO nor during the course of his employment with NASSCO. Dr. Averill based his opinion on the fact that the left elbow injury arose during a period when Mr. Sibert was not actively working for NASSCO. He rejected the theory that the left elbow pain was caused by compensation for the right elbow injury of 1997 because there were no subjective complaints about the left elbow during that time and Mr. Sibert's workload was reduced after the right elbow surgery. RX-A, pp. 11-15; CX-12.

On February 26, 2001, Dr. Averill again examined Mr. Sibert's left elbow. Dr. Averill's opinion on that occasion was that, in light of his use of a walker after back surgery, Mr. Sibert's left elbow injury did arise out of his employment and during the course of his employment. RX-A, pp. 5-10; CX-12.

On May 25, 2001, Dr. Averill again addressed the issue of whether Mr. Sibert's lateral epicondylitis in his left elbow was work-related. Dr. Averill was in agreement with the California Worker's Compensation Judge's determination that Mr. Sibert's left elbow injury was not caused by overcompensation due to his previous right elbow injury. However, Dr. Averill was of the opinion that Mr. Sibert's left elbow lateral epicondylitis was the result of his back surgery and subsequent use of a walker or crutches. Because the back surgery stemmed from a work-related injury, Dr. Averill was of the opinion that Mr. Sibert's left elbow injury should be treated on an industrial basis. RX-A, pp. 3-4; CX-12.

On February 10, 2002, Dr. Averill reported to Respondent's attorney that the use of a walker or crutches was certainly not the cause of Mr. Sibert's left elbow injury. Dr. Averill based his opinion on the fact that the patient had stopped using a walker or crutches for almost ten months before he had symptoms in his left elbow. He stated that lateral epicondylitis develops from a specific cause and the pain usually comes on at the time the patient was doing the activity. RX-A, pp. 1-2; CX-12.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses', and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applied the principle, enunciated in Director, OWCP v. Maher Terminals, Inc., 115 S. Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates section 556(d) of the Administrative Procedures Act. See Director, OWCP v. Greenwich

Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. § 919(d) and 5 U.S.C. § 554, by way of 20 C.F.R §§ 702.331 and 702.332. See Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986).

In order to demonstrate coverage under the Longshore and Harbor Workers' Compensation Act, a worker must satisfy both a situs and a status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed. 2d 225.

The situs test originates from § 3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from § 2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Id. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ." Id. To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

Coverage under the Act is not contested in this case, and the Court will adjudicate the remaining issues.

CAUSATION

A. Section 20(a) Presumption

The claimant has the burden of establishing a prima facie case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318 (1982). Once the claimant establishes these two elements of his prima facie case, section 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hamptom v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). Furthermore,

when an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural or unavoidable result of the original work injury. See Atlantic Marine v. Bruce, 661 F.2d 898, 901, 14 BRBS 63, 65 **(**5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 456-57 **(**9th Cir. 1954); Mijangos v. Avondale Shipyards, 19 BRBS 15, 17 (1986).

The Court finds Mr. Sibert has established a prima facie case of compensability and is entitled to the § 20(a) presumption. First, neither party contests the fact that Mr. Sibert has an injury in his left elbow, and the existence of his left elbow injury is well documented in the medical reports of both Dr. Levine and Dr. Averill. See CX-8; CX-12; RX-A; RX-C. Therefore, Mr. Sibert has met the first element of establishing a prima facie case by showing that he has sustained an injury.

Second, Mr. Sibert has demonstrated that working conditions or a work-related accident could have caused his left elbow injury. Dr. Levine testified that he thought Mr. Sibert's strenuous labor at NASSCO for 31 years contributed to the left elbow injury. See TR. 34; CX-8, p. 117; CX-24, p. 255; RX-C. Dr. Levine's medical opinion also was that the left elbow injury is linked to Mr. Sibert's employment at NASSCO by way of prior work-related injuries to Mr. Sibert's right elbow and back. See TR. 37-38; CX-8, pp. 34-41; CX-12, p. 153; RX-A; RX-C. According to Dr. Levine, the consequences of those prior injuries–overcompensation for his disabled right arm with his left arm, use of the walker, the home stretching exercises as part of his back surgery recovery, and the falling resulting from his drop foot condition after the back surgery–created increased stress on Mr. Sibert's left elbow, causing the lateral epicondylitis to develop. See TR. 37-39; CX-8, pp. 117, 123; RX-C. Based on Dr. Levine's testimony and reports, Mr. Sibert has demonstrated that working conditions and/or work-related accidents could have caused the left elbow injury. Therefore, Mr. Sibert has fulfilled the second requirement of establishing a prima facie case and is entitled to the § 20(a) presumption that his left elbow injury is linked to his employment at NASSCO.

B. Rebuttal Evidence

After the section 20 presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 186, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., et. al, 25 BRBS 15, 21 (1991).

In a case involving a subsequent injury, an employer can rebut the Section 20(a) presumption by showing that the claimant'sdisabling condition was caused by a subsequent event, provided the employer also proves that the subsequent event was not caused by the claimant'swork-related injury. Plappert v. Marine Corps exchange, 31 BRBS 13, 15 (1997); Bass v. Broadway Maintenance, 28

BRBS 11 (1994); James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause such as the employee'sintentional or negligent conduct, the employer is relieved of liability for that portion of the disability attributable to the subsequent injury. See Bludworth Shipyard v. Lira, 700 F.2d 1046, 1051, 15 BRBS 120, 123-24 (CRT) **(**5th Cir. 1983); see also Plappert, 31 BRBS at 15; Cyr, 211 F.2d at 457; Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650, 652 (1979).

NASSCO has presented sufficient evidence to rebut the § 20(a) presumption. First, NASSCO established that Mr. Sibert did not have any left elbow symptoms until January 2000. See TR. 20, 31. Second, NASSCO points out that from October 1998 until the time when Mr. Sibert first reported the left elbow pain to a doctor, in April 2000, Mr. Sibert worked only 3 ½ days at NASSCO. See TR. 30. These 3 ½ days occurred in September of 1999, about four months before Mr. Sibert first felt the left elbow pain. See TR. 30; RX-C, p. 57; CX-8. Third, about 10 months passed between the time Mr. Sibert last used a walker or cane until the time the left elbow symptoms appeared. See TR. 30-31; RX-C p. 76; CX-8. The time discrepancy between when Mr. Sibert first felt the pain and the last time he worked, in light of the period's brevity, as well as when he last used a walker or cane, is persuasive evidence for § 20(a) rebuttal purposes.

NASSCO also submitted medical findings of Dr. Averill wherein Dr. Averill concluded that the left elbow injury was not employment-related. See RX-A, pp. 1-2, 11-15; CX-12. In an April 24, 2000 medical report, Dr. Averill reasoned that the left elbow injury was not employment-related because it arose during a period when Mr. Sibert was not actively working for NASSCO and because it was not caused by compensation for Mr. Sibert's right elbow injury. See RX-A, pp. 11-15; CX-12. In correspondence to NASSCO's attorney on February 10, 2002, Dr. Averill stated that Mr. Sibert's use of the walker or crutches was not the cause of his left elbow injury, basing his conclusion on the fact that ten months had passed between the time Mr. Sibert stopped using a walker or crutches and the time the left elbow symptoms began. See RX-A, pp. 1-2; CX-12. Although these medical opinions are contradicted by opinions given by Dr. Averill on February 26, 2001 and May 25, 2001, the Court finds them relevant and substantial for purposes of rebutting the § 20(a) presumption. Based on the medical findings of Dr. Averill and the time discrepancies as earlier described, the Court finds that the § 20(a) presumption is successfully rebutted.

Because NASSCO has successfully rebutted the § 20(a) presumption, the issue of causation must be resolved based on the evidence as a whole. Considering all the evidence, the Court finds that Mr. Sibert's left elbow injury is employment-related. Dr. Levine's testimony and medical reports have been consistent in concluding that the left elbow injury stems from Mr. Sibert's work activities with NASSCO and Mr. Sibert's prior work-related injuries to his right elbow and back. Dr. Levine opined that strenuous labor at NASSCO for 31 years contributed to Mr. Sibert's left elbow injury. See TR. 34. Dr. Levine further based his conclusion on the fact that the left elbow symptoms are identical to Mr. Sibert's previous right elbow symptoms that were brought on by work activities. See TR. 34-35. Dr. Levine offered a persuasive explanation for the time discrepancy between the last time Mr. Sibert worked regularly and when Mr. Sibert first acknowledged the left elbow pain. Dr. Levine stated that often when someone has an injury, especially a back injury, the person focuses on

that area of injury and ignores other areas, possibly causing a failure to detect other injuries. See TR. 36.

Dr. Levine also based his opinion on the increased stress to Mr. Sibert's left elbow as a result of his prior work-related injuries to his right elbow and back. The fact that these prior injuries are work-related is not contested by either party and is documented in medical reports of Dr. Levine and Dr. Averill. See CX-8, pp. 34-41; CX-12, p. 153; RX-A; RX-C. Dr. Levine disagreed with the determination by the California Worker's Compensation Appeals Board that Mr. Sibert's left elbow pain was not caused by compensating for his right elbow when it was injured. See TR. 37. Dr. Levine also testified that Mr. Sibert's use of the walker after back surgery placed considerable stress on his upper extremities. See TR. 35, 38. He testified that Mr. Sibert's home stretching exercises also put stress on his left elbow because gripping the countertop caused tension to be applied across the forearm muscles and onto the elbow. See TR. 38-39. As a result of the back surgery, Mr. Sibert developed a drop foot condition, causing a tendency for him to trip and fall down. See TR. 23-24. According to Dr. Levine, the instances in which Mr. Sibert fell down may also have contributed to his left elbow injury. See TR. 38. Dr. Levine also bases his opinion on the fact that only industrial-based stresses were present; there were no nonindustrial stresses that could have caused the left elbow injury. See TR. 35-37.

Mr. Sibert's testimony corroborates Dr. Levine's determination that nonindustrial stresses were not present when the left elbow injury developed. Mr. Sibert testified that from September 1999 to April 2000, his home activities were limited generally to walking twice a day and doing his home exercises. He did not participate in any other home activities because he did not want to injure himself further with respect to his back condition. Other than reaching to get a cup or paper plate, Mr. Sibert did not do home activities

that involved reaching or grasping items above shoulder level. Housework and yard work had to be done by someone else. See TR. 28-29. Mr. Sibert's testimony about the limitations of his home activities is uncontroverted.

NASSCO submitted the medical reports of Dr. Averill in support of its assertion that the left elbow is not employment-related. Indeed, Dr. Averill does conclude the left elbow was not employment-related in two of his reports, dated April 24, 2000 and February 10, 2002. However, in two other reports dated February 26, 2001 and May 25, 2001, Dr. Averill concluded that the left elbow injury was employment-related. In his April 24, 2000 report, Dr. Averill rejected the theory that the left elbow pain was caused by compensation for the right elbow injury of 1997, concluding that the left elbow injury was nonindustrial because it did not arise during a period when Mr. Sibert was not actively working for NASSCO. See RX-A, pp. 11-15; CX-12. On February 26, 2001, after considering Mr. Sibert's use of the walker, Dr. Averill concluded that Mr. Sibert's left elbow injury did arise out of his employment and during the course of his employment. See RX-A, pp. 5-10; CX-12. This finding is of course in direct contradiction to his April 24, 2000 report. On May 25, 2001, Dr. Averill was in agreement with the California Worker's Compensation Judge's determination that Mr. Sibert's left elbow injury was not caused by overcompensation due to his previous right elbow injury, but he was of the opinion that Mr. Sibert's left elbow injury was the result of his back surgery

and subsequent use of a walker or crutches. See RX-A, pp. 3-4; CX-12. Finally, on February 10, 2002, Dr. Averill reported to Respondent's attorney that the use of a walker or crutches was certainly not the cause of Mr. Sibert's left elbow injury, basing his opinion on the fact that the patient had stopped using a walker or crutches for almost ten months before the left elbow symptoms began. See RX-A, pp. 1-2; CX-12. Although Dr. Averill's latest opinion does support NASSCO's contention that the left elbow injury was not work-related, the inconsistency of his reports takes away from the persuasiveness of his final opinion.

Therefore, in light of the consistency and cogency of Dr. Levine's medical opinions, Dr. Levine's persuasive explanation of the time discrepancies in detecting the injury, the unrefuted testimony of Mr. Sibert as to the limitations of his home activities, and the inconsistency of Dr. Averill's conclusions, the Court finds that Mr. Sibert's left elbow injury stems from his employment activities at NASSCO and his prior work-related injuries.

C. Collateral Estoppel

NASSCO also asserts that a prior finding by the California Worker's Compensation Appeals Board, wherein the Judge found that Mr. Sibert's left arm injury did not result from compensation for his previous right arm injury, satisfies the requirements for collateral estoppel in this Court. NASSCO asserts therefore that Mr. Sibert is collateral estopped from re-litigating the issue of whether the left arm injury stems from compensation for the right arm injury.

The doctrine of collateral estoppel prevents parties from relitigating issues that have been resolved in an earlier action between the same parties or their privies. In Re Peterson, 451 F.2d 1291, 1292 (9th Cir. 1971), citing 1B Moore's Federal Practice ¶ 0.443[1]. Factual findings of a state administrative tribunal may be entitled to collateral estoppel effect in other state or federal administrative tribunals. Barlow v. Western Asbestos Co., 20 BRBS 179, 180-181 (1988); Thomas v. Washington Gas Light Co., 448 U.S. 261, 12 BRBS 828 (1980). However, the application of collateral estoppel is precluded when there is a substantial variance in the legal standards of the fora. Young & Co. v. Shea, 397 F.2d 185, 188-189 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969); see also In Re Peterson, 451 F.2d 1291, 1292 (9th Cir. 1971) (stating collateral estoppel applies only to issues that are identical in both actions, and issues are not identical if the second action involves application of a different legal standard.); Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP, 583 F.2d 1273, 1278-79, 8 BRBS 723, 730-732 (4th Cir. 1978), cert. denied, 440 U.S. 915 (1979) (stating relitigation of an issue is not precluded by collateral estoppel where the party against whom the doctrine is invoked had a heavier burden of persuasion regarding that issue in the first action than he does in the second, or where his adversary has a heavier burden in the second action than he did in the first).

In this case, NASSCO has not established that the legal standards for causation before the California Worker's Compensation Appeals Board are the same as this Court's legal standards for causation. Therefore, NASSCO is not entitled to collateral estoppel on the issue of whether the left

elbow injury resulted from compensation for the prior work-related right elbow injury. Cf. Barlow, 20 BRBS at 181 (stating that collateral estoppel does not apply because claimant did not show that the standards for establishing extent of impairment and commencement of benefits under the California Workers' Compensation statute are identical to those under the Act).

Having so ruled, the Court notes that even if collateral estoppel were to apply on that issue, the Court's determination that Mr. Sibert's left elbow injury is work-related would not change. That is, even if NASSCO did successfully show that Mr. Sibert's left elbow injury was not at all a result of his prior work-related right elbow injury, NASSCO has failed to refute to this Court's satisfaction the evidence regarding the connection between the left elbow injury and Mr. Sibert's prior work-related back injury as well as between the left elbow and Mr. Sibert's strenuous labor while employed at NASSCO.

NATURE AND EXTENT OF DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

In this case, the parties agree that Mr. Sibert requires further back surgery for removal of a metal structure which is impinging against a nerve root. RX-N. Therefore, the Court finds that Mr. Sibert's condition has not become permanent and stationary and that Mr. Sibert is totally disabled given the back surgery. The Court finds this total disability began on April 20, 2001, the date Dr. Levine recommended the removal surgery. CX-8, p. 120. The parties have stipulated that Mr. Sibert's average weekly wage is $808.00. JX-1. Therefore, Mr. Sibert is entitled to temporary total disability benefits from NASSCO based on an average weekly wage of $808.00.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258

(1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); See Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), aff'g 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; See also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curium), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); See McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); See Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). The Fourth Circuit has reversed a holding by the Board that a request to the employer before seeking treatment is necessary only where the claimant is seeking reimbursement for medical expenses already paid. The court held that the prior request requirement applies at all times. See Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g, 6 BRBS 550 (1977).

The Court has found that Mr. Sibert has sustained a work-related injury to his left elbow. Therefore, Mr. Sibert is entitled to reasonable and necessary past and future compensable medical treatment associated with his left elbow injury. This includes surgery on the left elbow, which may be necessary and reasonable if the left elbow does not respond to conservative treatments. TR. 39-41; CX-8, pp. 117, 123, 125.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1. Employer /Carrier shall pay to Claimant compensation for temporary total disability benefits from April 20, 2001 and continuing, based on an average weekly wage of $808.00.

2. Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.

3. Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant after April 20, 2001.

4. Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary past and future medical expenses, with interest in accordance with Section 1961, which are the result of Claimant's left elbow injury.

5. Claimant's counsel shall have thirty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge